



STATE OF CONNECTICUT

OFFICE OF STATE ETHICS

DRAFT ADVISORY OPINION 2010-2

Application of the Code of Ethics for Public Officials to Various Boards and Committees Affiliated with the Board of Education and Services for the Blind

Introduction

The Citizen's Ethics Advisory Board issues this advisory opinion at the request of Attorney Andrew Norton, Legislative and Legal Affairs Director for the Board of Education and Services for the Blind ("BESB"). He has asked whether certain members of various boards and committees associated with BESB are subject to the Code of Ethics for Public Officials ("the Code") and its revolving door restrictions, and whether the benefits they may receive as clients of BESB are restricted by the Code. The bodies in question are the (1) Board of Directors of BESB ("Board of Directors"); (2) the State Rehabilitation Council; (3) the State Committee of Blind Vendors; (4) the Deaf-blind Advisory Committee; and (5) the Agency Consumer Advisory Committee.

Facts

The facts are based on those presented in Attorney Norton's correspondence and, when specific to the board or committee in question, are specifically discussed in sections A through E herein.¹ The facts presented by Attorney Norton specify that, with the exception of the Board of Directors, these bodies are established to advise, recommend or consult with a public official or branch of government, members receive no public funds other than per diem payments or reimbursements for actual and necessary expenses incurred in the performance of official duties, and members have no authority to expend any public funds.

Question

We consider whether members of the boards and committees in question are "public officials," as that term is defined in General Statutes § 1-79 (k), solely by virtue of holding such position; and whether those members are subject to the Code's revolving door restrictions.

¹Letters of Attorney Norton to the Office of State Ethics of November 3, 2009, and February 1, 2010 (on file with the Office of State Ethics).

Conclusion

Based on the facts presented by Attorney Norton, we conclude as follows: (1) members of Board of Directors are “public officials,” solely by virtue of such membership, and thus subject to the Code and the Code’s revolving door restrictions; (2) members of the State Rehabilitation Council, the State Committee of Blind Vendors, the Deaf-blind Advisory Committee, and the Agency Consumer Advisory Committee are not “public officials,” solely by virtue of such membership, and thus not subject to the Code’s restrictions including the revolving door restrictions, and the benefits they may receive as clients of BESB are unimpaired by their service on these bodies. Individuals who meet the definition of “member of advisory board” are excluded from the definition of “public official” and are therefore not subject to the Code.

Analysis

1. Are the Members “Public Officials”?

The Code defines the term “public official” as follows:

“Public official” means any state-wide elected officer, any member or member-elect of the General Assembly, any person appointed to any office of the legislative, judicial or executive branch of state government by the Governor or an appointee of the Governor, with or without the advice and consent of the General Assembly . . . any person appointed or elected by the General Assembly or by any member of either house thereof, any member or director of a quasi-public agency and the spouse of the Governor, *but shall not include a member of an advisory board . . .*²

Thus, to determine whether members of the bodies in question are “public officials,” we must look both to their manner of appointment and to whether they are exempt from the term “public official” as “members of any advisory board,” which the Code defines as follows:

“Member of an advisory board” means any individual (1) appointed by a public official as an advisor or consultant or member of a committee, commission or council established to advise, recommend or consult with a public official or branch of government or committee thereof, (2) who receives no public funds other than per diem payments or reimbursement for his actual and necessary expenses incurred in the performance of his

²(Emphasis Added.) General Statutes § 1-79 (k).

official duties, and (3) who has no authority to expend any public funds or to exercise the power of the state.³

Members must meet all three prongs of this definition to qualify as a “member of an advisory board.” The facts presented include that, aside from the Board of Directors, members of all these bodies meet the first two prongs. They also meet the first part of the third prong in that they have “no authority to expend any public funds.” The only question, therefore, is whether they meet the second part of the third prong, namely, whether they “exercise the power of the state.”

In prior advisory opinions, the following activities have been determined to fit within the meaning of the words “exercise the powers of the state” for the purposes of § 1-79 (h) (3):

- The ability of a member of the Judicial Review Council to suspend a State judge from office for a term not to exceed one year.⁴
- The power of the State Codes and Standards Committee to adopt, promulgate, and administer the State building code and Fire Safety Code. The power, jointly with the State Fire Marshal, to establish standards and qualifications for local officials, administer examinations to determine their qualifications and license and certify them. The power to hear and decide appeals from municipal boards of appeals and from decisions of local fire marshals or the State Fire Marshal.⁵
- The power of the Elections Commission to investigate possible violations of the elections laws, hold investigative hearings, administer oaths, subpoena witnesses, compel production of books and papers, seek court enforcement of subpoenas, and issue advisory opinions.⁶

In contrast, the following activities have been found to be outside of the meaning of the words “exercise the power of the state”:

- The ability of the Central Housing Committee to foster cooperation and communication among those involved in meeting the housing needs in Connecticut through assisting, advising, consulting, commenting and proposing.⁷

³General Statutes § 1-79 (h).

⁴Advisory Opinion No. 1978-24.

⁵Advisory Opinion No. 1986-3.

⁶Advisory Opinion No. 1978-21.

⁷Advisory Opinion No. 1978-23.

- The ability of the Law Review Commission to review, recommend, educate, discuss and assist similar bodies studying the law, as well as the ability to adopt regulations limited to rules of practice and procedure to permit it to carry out its business.⁸
- The ability of the Department of Public Health's Subsurface Code Advisory Committee to provide advice regarding Technical Standards.⁹
- The ability of the Pharmaceutical and Therapeutics Committee, within the Department of Social Services, to recommend what should be added to or removed from the preferred-drug list.¹⁰

A. *Board of Directors*

The Board's members are separately appointed by the Governor and the six caucus leaders of the legislature.¹¹ The manner of their appointment, by the Governor or a member of the General Assembly, places members of the Board of Directors within the definition of "public official." Members of the Board of Directors are identified in the enabling statute as the "central policy making authority for the agency."¹² In this capacity the Board of Directors sets benchmarks, guidelines and policies for BESB to follow in the delivery of services. When distinguishing a "member of an advisory board" from a "public official," the State Ethics Commission determined the statutory term "central policymaking authority" to be a clear grant of the exercise of state power.¹³ The Board of Directors also has the power to adopt "regulations for determining which persons shall receive benefits under the provisions of [Chapter 174]."¹⁴ This regulatory power is distinguishable from the more limited power of the Law Review Commission discussed in Advisory Opinion No. 1978-28. In this instance, unlike that discussed in Advisory Opinion No. 1978-28, the power to adopt regulations that affect the rights and duties of other persons is an example of the authority to "exercise the power of the state."

⁸Advisory Opinion No. 1978-22. See also General Statutes § 2-88 regarding the limited authority of the Law Review Commission to adopt regulations.

⁹Advisory Opinion No. 2010-1.

¹⁰Advisory Opinion No. 2009-2.

¹¹General Statutes § 10-293 (b) (1).

¹²General Statutes §10-293 (a).

¹³See Advisory Opinion No. 78-22 (holding that because members of the Public Health Council are the "central policy making authority" for the Department of Public Health, they "exercise state power").

¹⁴General Statutes § 10-294.

Because they meet the definition of “public official” and do not meet the exception for a “member of an advisory board,” members of the Board of Directors are, solely by virtue of such membership, subject to the Code’s general jurisdiction.¹⁵

B. *Statewide Committee of Blind Vendors*

The Statewide Committee of Blind Vendors is a committee of individuals who are operators of vending facilities in government buildings. They advise BESB on the administration of the Business Enterprise Program (“BEP”). The BEP serves those vendors and assists them in their operations. The Statewide Committee of Blind Vendors members are elected by all blind operators working in and licensed by the BEP.¹⁶ Thus, their manner of appointment, i.e., election by a group of vendors, is not one included in the definition of “public official.”

Because they do not meet the definition of “public official,” Statewide Committee of Blind Vendor members are not, solely by virtue of such membership, subject to the Code’s general jurisdiction.

C. *Statewide Rehabilitation Council (“SRC”)*

Members of the SRC are appointed by the Governor. Thus, the manner of appointment is one included in the definition of “public official,” and they are subject to the Code’s jurisdiction as public officials, unless they meet all three prongs of the definition of “members of advisory board.”

The SRC is created by federal regulation and only advises BESB in the execution of the Vocational Rehabilitation Services program.¹⁷ While the BESB Executive Director cooperates with the SRC and generally accepts its recommendations, the SRC holds no controlling authority. Further, its members receive no public funds other than, perhaps, per diem payments or reimbursements; and they have no authority to expend public funds. Accordingly, SRC members fit within the definition of “members of an advisory board,” which excludes them from the definition of “public official.”

Because they do not meet the definition of “public official,” SRC members are not, solely by virtue of such membership, subject to the Code’s general jurisdiction.

D. *Deaf-blind Advisory Committee (“DAC”)*

¹⁵The restrictions on “public officials” include the revolving door restrictions under General Statutes § 1-84a and § 1-84b.

¹⁶Regs., Conn. State Agencies § 10-303-9.

¹⁷34 C.F.R. §§ 361.16, 361.17, 361.18.

The DAC was created by state regulation.¹⁸ It advises BESB on the individual allotment of legislatively appropriated funds to provide services to persons with deaf-blindness. The regulation identifies certain groups which may then delegate a member to be appointed; however, there is no specific appointment process or authority exercised by any government actor. Instead, members who are appointed or delegated directly by the constituent groups include both state entities (e.g., the Department of Developmental Services and the Commission on Deaf and Hearing Impaired) and private persons (e.g., representatives of parents, a private foundation and a private center). Thus, the manner of appointment for these members is not one included in the definition of “public official.”

However, even if DAC members’ method of appointment qualified under the definition of “public official,” they would also satisfy the definition of “member of an advisory board,” thereby excluding them from the definition of “public official.” That is, members only have the ability to consult and recommend; they receive no public funds other than per diems or necessary expenses; and they do not expend public funds or exercise the power of the state. Thus, members of DAC are not “public officials.”

Because they do not meet the definition of “public official,” DAC members are not, solely by virtue of such membership, subject to the Code’s general jurisdiction.

E. *Agency Consumer Advisory Committee (“ACAC”)*

ACAC was formed by BESB to give clients, client organizations, and advocacy groups a forum for advising and providing input to BESB on matters of interest to those persons or groups. The membership is determined by constituents that are asked to provide a representative. There are no laws or regulations establishing or controlling ACAC. However, even if ACAC members’ method of appointment qualified under the definition of “public official,” they would also satisfy the definition of “member of an advisory board,” thereby excluding them from the definition of “public official.” That is, members only have the ability to consult and recommend; they receive no public funds other than per diems or necessary expenses; and they do not expend public funds or exercise the power of the state. Thus, members of ACAC are not “public officials.”

Because they do not meet the definition of “public official,” ACAC members are not, solely by virtue of such membership, subject to the Code’s general jurisdiction.

¹⁸Regs., Conn. State Agencies § 10-295-1.

By order of the Board,

Dated _____

G. Kenneth Bernhard, Chairperson